ORIGINAL

No. 89-522

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RONALD L. POWELL, Commissioner
Department of Corrections
and
MICHAEL CUNNINGHAM, Warden,
New Hampshire State Prison
Petitioners

v.

VINCENT COPPOLA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly hold that the Fifth Amendment prohibits use by the prosecution in its case-in-chief of the respondent's pre-Miranda assertion of his right to remain silent?

2. Was the Court of Appeals correct in holding that whether respondent's statement constituted an assertion of his right to remain silent was a mixed question of law and fact and thus not entitled to the presumption of correctness under 28 U.S.C. §2254(d)?

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Petition for a Writ of Certiorari
to the United States Court
of Appeals for the First Circuit

The respondent, Vincent Coppola, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the First Circuit's opinion in this case. That opinion is reported at 878 F.2d 1562.

STATEMENT OF THE CASE

Shortly after midnight on January 26, 1986, a man forcibly entered the home of Jessica Hodgins in Epsom, New Hampshire, and for the next half hour sexually assaulted her. (T. 1-63, 67,71).[1] Based on her description of the man, the police went to the home of Vincent Coppola and questioned him that same night at 2:30 a.m. (T. 2-123). Three days later two state troopers returned to Coppola's house to question him.

> Q. [By the prosecutor] Okay. Tell us what happened.
>
> A. [By the state trooper] Well, I asked him if he'd be willing to talk to us. At this time he said to me, "Let me tell you something, I'm not one of your country bumpkins, I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy."

(T. 4-596).

The trooper's next statement to Coppola was, "I just want to give you your rights and then talk to you." (T. 4- 596). Coppola said "that he would not talk [to the trooper] without a lawyer." (T. 4-596).[2]

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[1] "T." refers to the eight volumes of trial transcript labelled "Day One, Day Two, etc." "T. 1" refers to Day One followed by the page number.

[2] The quoted testimony is from a suppression hearing out of the jury's presence. At trial the jury did not hear the defendant's demand for counsel but did hear his refusal to confess. (T. 4- 616).

Six weeks later - March 6, 1986 - Jessica Hodgins found footprints in the snow around her house. Believing the assailant had returned, she telephoned the state police, who arrested Coppola that evening. (T. 1- 92).

At trial, Jessica Hodgins did not identify Coppola as the assailant. There was, however, evidence that Coppola's car was in the vicinity of Hodgins' house (T. 3- 360), and that he had made inculpatory statements to three inmates. (T. 3- 468, 485, 550). None of the scientific evidence definitively linked Coppola to the crime. (T. 2-229, 305; T. 3-435).

Coppola did not testify at trial.

Coppola's convictions were affirmed by the New Hampshire Supreme Court but remanded for resentencing. State v. Coppola, 130 N.H. 148, 536 A.2d 1236 (1987). The United States District Court for the District of New Hampshire denied relief under 28 U.S.C. §2254. The First Circuit reversed. Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989). A petition for rehearing en banc was denied without dissent.

REASONS FOR DENYING THE WRIT

1. There is no conflict with decisions of other federal courts of appeal on the issue presented.

Petitioners claim that the First Circuit's decision below conflicts with the decisions in United States v. Rederth, 872 F.2d 255 (8th Cir. 1989), and United States v. Harrold, 796 F.2d 1275 (10th Cir. 1986), cert. denied, 479 U.S. 1037 (1987). Not only is there no real conflict with these other circuits, the First Circuit's decision is consistent with the Fifth Amendment principles articulated by this Court.

The court below held that the State violated the defendant's Fifth Amendment right to remain silent by using his pre-Miranda silence against him in its case-in-chief. Rederth and Harrold while also involving use in the government's case-in-chief of the defendant's pre-Miranda silence, were decided under a due process analysis. Relying on this Court's opinions in Doyle v. Ohio, 426 U.S. 610 (1976), and its progeny, the Eighth and Tenth Circuits ruled that where the defendant's silence was not induced by reliance on any assurances by the government, it was not unfair to use that silence against him at trial. Rederth, 872 F.2d at 257-58; Harrold, 796 F.2d at 1279. Thus, unlike the case at bar Rederth and Harrold were based on due process.

The First Circuit, on the other hand, utilized the analytical framework of the Fifth Amendment, where the respondent's silence was admitted at trial not for impeachment

but substantively to prove guilt. It relied on the principle stated by this Court in Griffin v. California, 380 U.S. 609, 615 (1965), that "'the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.'" Coppola v. Powell, 878 F.2d at 1568. Reasoning that testimony about the respondent's silence in the prosecution's case constituted the impermissible use of silence as evidence of guilt, the First Circuit simply followed Fifth Amendment precedent established by this Court.

The only other court of appeals decision directly addressing this issue, the Seventh Circuit in United States ex rel. Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987), applied the Griffin principle and reached the same result under the Fifth Amendment as did the First Circuit.

The apparent conflict in results between the circuit court opinions evaporates when the divergent approaches are scrutinized. The Eighth and Tenth Circuits did not apply Fifth Amendment principles to arrive at a holding contrary to that of the First Circuit. There is thus no real conflict between the circuits on the same matter of law and thus no substantial reason for granting the writ.

2. The holding that whether respondent's statements constituted an assertion of his privilege against self-incrimination is a mixed question of law and fact and is not in conflict with other federal courts of appeals or decisions in this Court.

Petitioners argue that the First Circuit "erred in according plenary review to the State court's factual finding that the Respondent waived his right to remain silent" and that "[t]here is a division between federal courts of appeal on the proper standard for reviewing determinations concerning invocation or waiver of the right to remain silent." Pet. Cert. 7-8. Petitioners' argument is erroneous for two reasons:

First, the issue in this case was not waiver of the right to remain silent. Thus, whether there is a split in the circuits on the applicability of 28 U.S.C. §2254(d) to waiver of the right to remain silent (or Miranda waiver) is irrelevant. Petitioners are thus asking the Court to decide the applicability of 2254(d) to the issue of the validity of a Miranda waiver in a case that does not involve Miranda waiver.

Second, the issue here is what legal significance should be given to respondent's statement to the police. There is no dispute about what was said and no conflicting versions to choose from. The First Circuit was thus in the same position as the New Hampshire Supreme Court in determining whether respondent's statement constituted an invocation of the Fifth Amendment. Miller v. Fenton, 474 U.S. 104, 114 (1985)("[T]he fact/law distinction at times has turned on a determination that, as a matter of sound administration of justice, one

judicial actor is better positioned than another to decide the issue in question.").

The First Circuit's decision was consistent with other decisions holding that the legal effect of statements is a mixed question of law and fact. Dickerson v. State of Alabama, 667 F.2d 1364, 1368 (11th Cir.), cert. denied, 459 U.S. 878 (1982)(whether statements by defense counsel were sufficient to constitute a request for a continuance is a mixed question of law and fact); Agee v. White, 809 F.2d 1487, 1493 (11th Cir. 1987)(whether statements by police during interrogation implicitly promised defendant immunity is mixed question of law and fact).

In Agee the court noted that in Miller v. Fenton,

> [A]ll of the examples of such "facts" listed by the Court concern historical facts in the strictest sense: the properties of a drug, the credibility of a witness . . . the "length and circumstances of the interrogation" and the experience of the defendant.

809 F.2d at 1494 (citations omitted).

Whether respondent's statement constituted an assertion of his right to remain silent was not an historical fact as envisioned by Miller v. Fenton. The First Circuit's holding was thus correct.

Finally, in an aside, petitioners claim that acceptance of this case will "correct the injustice of letting an admitted rapist go free." Pet. Cert. 9. In fact, respondent is only entitled to a new trial and will not go free unless the State decided not to retry him or he is acquitted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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